

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA

v.

KIN YAN TAM

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CRIMINAL No.

98-00550-01

CIVIL No.

03-0141

Memorandum and Order

Yohn, J.

May ____, 2005

Presently before this court is defendant Kin Yan Tam's request for a certificate of appealability, pursuant to 28 U.S.C. § 2253, so that he may challenge my order of March 2, 2005 dismissing his motion under Rule 60(b) and my election, upon dismissal of the Rule 60(b) motion, not to transfer it to the Third Circuit Court of Appeals. For the reasons stated herein, Tam's request for a certificate of appealability will be denied as to both issues.

I. Background and Procedural History

On January 11, 2000, defendant Kin Yan Tam pled guilty to four federal conspiracy counts involving a scheme to import and distribute heroin and to launder proceeds from the drug sales. The indictment did not specify the quantity of drugs for which Tam was responsible, but in his plea agreement, Tam stipulated to having been a supervisor in a conspiracy to distribute drugs which involved more than five participants and at least 10 kilograms but less than 30 kilograms of heroin. Based on Tam's own testimony, I found that he was responsible for 18-19 units (or

12.6-13.3 kilograms)¹ of heroin and sentenced him to 240 months imprisonment on the first count, 120 months on the second count, and 252 months on the third and fourth counts, with the sentences to run concurrently.²

Tam appealed his conviction and his sentence, arguing that the district court lacked jurisdiction to accept his guilty plea, that his guilty plea was invalid, and that his sentence was illegal under *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt”). Both the conviction and the sentence were upheld by the Third Circuit Court of Appeals, which concluded that this court’s exercise of jurisdiction was proper, that Tam’s guilty plea was knowing and voluntary, and that Tam’s sentence was legal even in light of the change in law announced by *Apprendi* concerning the role of judicial fact finding in sentencing.³ *See United States v. Tam*, No. 00-1362 (3d Cir. Oct. 15, 2001).

On January 13, 2003, represented by new counsel, Tam filed a motion under 28 U.S.C. §

¹There are 700 grams of heroin in one unit.

²Tam’s guideline sentence range under the United States Sentencing Guidelines was 235 to 293 months. *See* Presentence Investigation Report. He had a total offense level of 38 and a criminal history category of I. *See id.* The maximum sentence on counts three and four, for which the quantity of heroin was unspecified in the indictment, was 240 months under 21 U.S.C. § 841(b)(1)(C). *See United States v. Tam*, No. 00-1362 (3d Cir. Oct. 15, 2001) at 7. The maximum sentence under 21 U.S.C. § 841(b)(1)(B) for a crime involving 100 or more grams of heroin was 40 years, or 480 months. *See id.*

³With respect to the *Apprendi* issue, the Third Circuit cited its own *en banc* decision in *United States v. Vazquez*, 271 F.3d 93 (3d Cir. 2001). *Vazquez* held that a defendant’s substantial rights were not affected, despite an *Apprendi* violation, where there was overwhelming, uncontested evidence of a drug quantity sufficient to warrant the sentence imposed.

2255 alleging ineffective assistance of counsel. Following a hearing, I denied the motion. Tam appealed the denial, and by order dated December 15, 2003, the Third Circuit denied his application for a certificate of appealability.

On August 9, 2004, Tam filed a motion to amend or supplement his § 2255 motion under Rule 15(d) of the Federal Rules of Civil Procedure, so that he could challenge his sentence under *Blakely v. Washington*, ___U.S.___, 124 S. Ct. 2531 (2004). By his motion, Tam sought to amend his original § 2255 motion to add the claim that the court's sentencing findings regarding the quantity of drugs involved in the offense and his role in the offense violate the constitutional rule announced in *Blakely*.

On December 2, 2004, I denied Tam's motion on the ground that amendment of a § 2255 motion under Rule 15(d) is no longer possible once the motion has been decided on the merits. I concluded that Tam's Rule 15(d) motion was, for all intents and purposes, a flawed attempt to circumvent the Antiterrorism and Effective Death Penalty Act's procedural requirement that a movant seeking to present a second or successive habeas motion in federal district court first file for authorization to do so in the appropriate court of appeals. *See* 28 U.S.C. § 2244(b)(3)(A) (requiring appellate court authorization prior to the filing of a second habeas motion under 28 U.S.C. § 2255).

Rather than moving in the Third Circuit Court of Appeals for authorization to file a successive § 2255 motion, Tam, on January 26, 2005, filed a Rule 60(b) motion for relief from judgment. In his Rule 60(b) motion, Tam again challenged the constitutionality of his sentence, this time in light of the Supreme Court's holding in *United States v. Booker*, ___U.S.___, 125 S. Ct. 738 (2005). Tam also claimed that his counsel had been ineffective, that his plea

agreement had been unlawfully procured due to his counsel's ineffectiveness, and that the admissions he made in his plea agreement were therefore invalid. Of the issues raised in the Rule 60(b) motion, only the *Booker* issue had not already been adjudicated on the merits and appealed without success.

Applying the Third Circuit's decision in *Pridgen v. Shannon*, 380 F.3d 721 (2004), I declined to reach the merits of Tam's Rule 60(b) motion. In *Pridgen*, the Third Circuit held that a district court is permitted to reach the merits of a Rule 60(b) motion in the habeas context only if the motion attacks the manner in which the habeas judgment was procured and not the underlying conviction. I concluded that, in light of *Pridgen's* discussion of the interaction between Rule 60(b) and the AEDPA, Tam's motion had to be construed as a second or successive habeas petition and, therefore, could not be decided on the merits as a proper Rule 60(b) motion. I dismissed the motion on March 2, 2005.

On April 8, 2005, Tam filed the instant request for a certificate of appealability. He also filed a notice of appeal to the Third Circuit. In his request for a certificate of appealability, Tam raises two issues related to the denial of Rule 60(b) relief in his case. The first issue is whether I abused my discretion or misinterpreted the Third Circuit's holding in *Pridgen* when I concluded that I lacked jurisdiction to reach the merits of the motion. The second issue is whether I erred, after concluding that I lacked jurisdiction to decide the motion on the merits, in not transferring Tam's motion to the Third Circuit Court of Appeals to be considered for certification as a second or successive habeas motion under 28 U.S.C. § 2255.

II. Discussion

A habeas petitioner seeking to appeal must obtain a certificate of appealability in order

for the court of appeals to exercise jurisdiction. *See* 28 U.S.C. § 2253(c)(1)(B) (“Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from the final order in a proceeding under section 2255.”). A certificate of appealability may be issued by a district judge. *See* Fed. R. App. P. 22(b)(1) (“...in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)”).

When the district court dismisses a habeas petition (of which Tam’s Rule 60(b) motion was the functional equivalent) on procedural grounds without reaching the prisoner’s underlying constitutional claim, a certificate of appealability should issue “when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

“Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further. In such a circumstance, no appeal [is] warranted.” *Id.*

Tam first contends that a reasonable jurist could find that I misapplied the Third Circuit’s holding in *Pridgen* to the facts of his case and thereby wrongly concluded that I was procedurally barred from reaching the merits of his mischaracterized Rule 60(b) motion. In *Pridgen*, the Third Circuit decided when a district court may reach the merits of a petitioner’s Rule 60(b) motion seeking to vacate a judgment denying habeas relief. The court held that in those instances in which the factual predicate of a petitioner’s Rule 60(b) motion attacks the manner in which the

earlier habeas judgment was procured and not the underlying conviction, the Rule 60(b) motion may be adjudicated on the merits. *Pridgen*, 380 F.3d at 727. However, when the Rule 60(b) motion seeks to collaterally attack the petitioner's underlying conviction, the motion should be treated as an unauthorized successive habeas petition. *Id.*

In *Pridgen*, the Third Circuit concluded, after surveying conflicting law in other circuits, that allowing a district court to reach the merits of a Rule 60(b) motion challenging a petitioner's underlying conviction (rather than the legitimacy of the habeas proceeding itself) would undermine Congress's intention in enacting the AEDPA, which was to promote the finality of judgments by restricting the availability of relief to habeas petitioners. *Id.* As the court reasoned in *Pridgen*, it is implausible to believe that Congress, which enacted the AEDPA in part to curtail the ability of prisoners to file successive petitions, "wanted Rule 60(b) to operate under full throttle in the habeas context." *Id.* (quoting from *Rodwell v. Pepe*, 324 F.3d 66, 67 (1st Cir. 2003)). On the contrary, there is every reason to believe that Congress intended to circumscribe the applicability of Rule 60(b) in habeas cases. In the wake of *Pridgen*, which resolved the conflict between the permissiveness of Rule 60(b) and the restrictiveness of the AEDPA in favor of the latter, an attack on the legitimacy of a habeas proceeding is allowed in this circuit under Rule 60(b), but an attack on the underlying conviction is not.

The distinction between the two types of attack is both critical and wholly dispositive of whether this court had jurisdiction to decide Tam's Rule 60(b) motion on the merits. Unlike a second or successive habeas petition, which is designed to remedy constitutional violations that arise out of facts discovered or laws announced after an initial habeas proceeding, a Rule 60(b) motion is designed to cure *procedural* violations in an earlier habeas proceeding. *See Mobley v.*

Head, 306 F.3d 1096, 1101-1102 (11th Cir. 2002) (Tjoflat, J., dissenting); *Rodwell*, 324 F.3d at 71 (stating that the “classic function” of a Rule 60(b) motion is to challenge “some irregularity or procedural defect” in the habeas proceeding, whereas a second or successive habeas petition challenges the constitutionality of the underlying conviction or sentence).

In his Rule 60(b) motion, Tam did not in any way attack the *procedural* integrity of his earlier habeas proceeding; rather, he attacked the underlying judgment of sentence in his case in light of *Booker*, which he believes renders his sentence unconstitutional. Absent an allegation that there was some procedural defect in Tam’s earlier habeas proceeding, *Pridgen* requires that Tam’s motion, which challenges the constitutionality of his sentence, be treated as an unauthorized second or successive habeas motion. No reasonable jurist analyzing Tam’s Rule 60(b) motion in light of the distinction between procedural and substantive attacks articulated in *Pridgen* could conclude that Tam’s challenge to his habeas judgment was anything but substantive in nature. There is, therefore, no question that it would have been improper for me to reach the merits of the motion. Because the existence of a procedural bar in this case is plain, a certificate of appealability is not warranted with respect to my decision not to reach the merits of Tam’s Rule 60(b) motion. *See Slack*, 529 U.S. at 484.

Tam next argues that he is entitled to a certificate of appealability so that he can appeal my election not to transfer his mischaracterized Rule 60(b) motion to the Third Circuit Court of Appeals for consideration as a motion for permission to file a second or successive habeas motion in district court.⁴ Under 28 U.S.C. § 1631, a district court is required to transfer a case to

⁴As I have consistently pointed out to Tam, there is no impediment to his exercising his right at any time to apply to the Third Circuit for an order authorizing me to consider his second or successive habeas corpus motion.

cure want of jurisdiction “if it is in the interest of justice.” *See* 28 U.S.C. § 1631. This provision has been interpreted in the habeas context to mean that a district court, presented with an improperly filed second or successive habeas petition, may either dismiss or transfer it, at the court’s discretion. *See Robinson v. Johnson*, 313 F.3d 128, 139 (3d Cir. 2002) (“When a second or successive habeas petition is erroneously filed in a district court without the permission of a court of appeals, the district court’s only option is to *dismiss the petition or transfer it* to the court of appeals pursuant to 28 U.S.C. § 1631.”) (emphasis added); *Jones v. Braxton*, 392 F.3d 683, 691 (4th Cir. 2004) (refusing to “bind the statutory discretion of the district courts” over transfers of unauthorized successive habeas petitions because Congress intended such transfers to be discretionary). Because transfer of an unauthorized successive habeas motion under 28 U.S.C. § 1631 is a discretionary statutory mechanism, failure to transfer such a motion cannot constitute the denial of a constitutional right. Tam is therefore not entitled to a certificate of appealability on the transfer issue.⁵

⁵Even if I had transferred Tam’s Rule 60(b) motion to the Third Circuit for treatment as a request to file a second or successive habeas motion, Tam’s request would probably not have been granted. The Third Circuit, following similar decisions in the Second, Sixth, Seventh, Tenth, and Eleventh Circuits, recently held that the Supreme Court’s decision in *Booker* is not applicable to persons seeking to file second or successive § 2255 motions. *See In Re: Olopade*, No. 05-1617 at 9 (3d Cir. April 11, 2005) (holding that the defendant, who relied on *Booker* in his motion for permission to file a second or successive habeas motion, had failed to make the prima facie showing required by 28 U.S.C. § 2244(b)(3)(C) that his request relied on a new rule of constitutional law made retroactive by the Supreme Court to cases on collateral review).

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CRIMINAL No.

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Order

Yohn, J.

AND NOW on this ____ day of May 2005, upon consideration of Kin Yan Tam's request for a certificate of appealability so that he may appeal the dismissal of his Rule 60(b) motion and the failure by this court to transfer his Rule 60(b) motion to the Third Circuit Court of Appeals for consideration as a request for permission to file a second or successive habeas motion, it is hereby ORDERED that, Tam having made no substantial showing of the denial of a constitutional right, there is no ground to issue a certificate of appealability and the request is, therefore, DENIED.

William H. Yohn, Jr., Judge